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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 381

E. E. ASHCRAFT AND JOHN WARE,
Petitioners,

vs.

STATE OF TENNESSEE,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

BRIEF OPPOSING ISSUANCE OF WRIT

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INDEX

Topographical Index

	Page
Foreword	1
Statement of the case	2
Brief	13
Argument on evidence	15
Argument on motion to dismiss	26
Argument on separate trial	29
Argument on Ware's confession	31
Argument on admissibility of Ashcraft's statements	36
Argument on refusal to allow reading of former opinion	40

Table of Authorities

A. Decisions of this Court:

Adams v. *U. S.*, 317 U. S., 269	15
Avery v. *Alabama*, 308 U. S., 444	13
Betts v. *Brady*, 316 U. S., 455	16
Buchalter v. *New York*, 319 U. S., 427	13
Lyons v. *Oklahoma*, 322 U. S., 596	14
Malinski v. *New York*, 325 U. S. — 89 L. Ed. 738	16

B. Tennessee Decisions:

Cooper v. *State*, 123 Tenn., 37	25
Curran v. *State*, 157 Tenn., 7	26
Davis v. *State*, 161 Tenn., 23	15
Dittberner v. *State*, 155 Tenn., 102	33
Foster v. *State*, 180 Tenn., 164	25
Givens v. *State*, 103 Tenn., 648	14
Jones v. *State*, 161 Tenn., 370	33
Kennon v. *State*, 181 Tenn., 415	13
Mahon v. *State*, 127 Tenn., 535	25
Pierce v. *State*, 130 Tenn., 24	29
Porter v. *State*, 177 Tenn., 515	30
Smithson v. *State*, 127 Tenn., 357	15
State v. *National Surety Co.*, 162 Tenn., 547	15

Page

Woodruff v. *State*, 164 Tenn., 530 13
Wynn v. *State*, 181 Tenn., 325 15

C. Other Authorities:

A. L. R., Vol. 77, Note P. 656 15
Hale v. *U. S.*, (C. C. A. 8th Cir.), 25 Fed. (2), 430 14
People v. *Paisley*, 299 Ill., 576, 132 N. E. 822 14,40
Wigmore on Evidence, 3rd. Ed. 14
Woods v. *U. S.*, (D. C. Ct. App.), 128 Fed. (2), 265 14

D. Tennessee Statutes:

Code of Tennessee:

Section 10761 29
Section 11536, subsec. 4 33
Ch. 69, Private Acts of 1917 34

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MAY IT PLEASE THE COURT:

Foreword

Counsel for the petitioners have made application for the issuance of the writ in forma pauperis and upon the typewritten record and have not furnished counsel for the respondent copy of such record. For this reason, references to the pages of the typewritten transcript can only be approximate.

In

Statement of the Case

The petition seeks the issuance of the writ for the purpose of reviewing a judgment of the Supreme Court of Tennessee affirming the conviction of petitioner John Ware as principal and that of petitioner Ashcraft as accessory before the fact for the murder of Mrs. Zelma Ashcraft on June 5, 1941.

The respondent had hoped that it would not be necessary to burden the Court with a discussion of the facts upon which the conviction rests; but since counsel for petitioners have made the assertion that the only testimony upon which the conviction may rest was extorted by means hardly in accord with the concept of due process; and since this Court has intimated upon several occasions that due process requires that the evidence supporting a conviction in a criminal case shall be of a substantial nature, it becomes necessary to review the facts upon which the conviction rests, to demonstrate the utter and erroneous nature of the claims of the petitioners. No doubt the petitioners have taken note of the principle so prevalent recently in psychological warfare that a distortion if repeated with sufficient frequency will induce the belief in the truth of such distorsion and have sought by a repetition of horrendous statements to convince this Court of the truth thereof.

The facts in the case concisely stated are as follows:

The deceased was the wife of the petitioner Ashcraft. The record discloses that sometime prior to her death, which occurred on the morning of June 5, 1941, Mrs. Ashcraft had been operated on to the extent of removing her Fallopian tubes and the major portion of her ovaries. The medical testimony leaves no doubt that this operation had made her extremely nervous and there is testimony in the record that at times she became almost hysterical. There is likewise evidence in the record reflecting seriously upon

her ability to consummate the marital relation. It is likewise inferable from the record that her religious faith prohibited a divorce on other than scriptural grounds.

Deceased and petitioner had accumulated some property. The record indicates that they owned as tenants by the entirety real estate assessed at $1700.00, that Mrs. Asheraft had an insurance policy upon her life in the sum of $1,000.00, that contained a double indemnity provision in case of accidental death and that the petitioner Asheraft was the beneficiary therein. The record indicates that the couple had approximately $3600.00 in savings and commercial accounts in a bank in Memphis, of which the sum of $1600.00 had been deposited on May 31 preceding the death of deceased. These were joint bank accounts and in case of the death of the deceased, the petitioner would take the entire sum as joint survivor.

The operations which Mrs. Asheraft had undergone seem to have addicted her somewhat to the use of amytal which the record shows is a hypnotic or sedative.

The petitioner Asheraft is a mature white man who was operating a steam shovel or dragline at the time of these happenings. The record leaves no doubt but that steady nerves are an essential to this occupation. John Ware, the other petitioner, is a young negro who does not appear in the record to be vicious in the slightest degree. He had worked upon these construction jobs with Asheraft and was well acquainted with the latter. His home lay approximately a mile from the home of Asheraft and between Asheraft's home and some of the construction jobs upon which both had been employed.

The deceased intended to leave her home in Memphis on the early morning of June 5, 1941, for an extended visit to her mother in Kentucky. She planned to make the trip in an automobile owned by the couple. So far as the record discloses, there were seven persons who were aware that

the deceased contemplated making this trip. These are Mrs. Gambreal, a neighbor; four young ladies who were student nurses and were at her home on the night before the trip; Cora Taylor, the negro maid of deceased, and the petitioner Ashcraft. Of these it may be said in passing that Mrs. Gambreal and the four student nurses seem to be above suspicion. Cora Taylor and her connections were completely investigated by the law enforcement officers of Shelby County and found to have been above suspicion and in addition thereto, so far as this record goes, the petitioner Ashcraft was the only one of the seven who was acquainted with Ware, a fact that becomes most material if Ware was the actual slayer, as the state insists.

The deceased planned to leave her home in the neighborhood of 3:00 A. M. upon this morning in order to make the trip as speedily as possible. No person in this record seems to have seen her leave, with the exception of the petitioner Ashcraft.

About 4:00 P. M. on this same afternoon attention was attracted to an automobile which had been parked on a road between Memphis and Raleigh and which had been sitting at that point virtually all day. The Sheriff's Patrol Cars were notified and Mr. Matteer, a Deputy Sheriff, came to this point and began to investigate. Shortly after he reached this automobile, his attention was directed to an object floating in a slough nearby and procuring a boat he went to the object and found it to be the body of deceased. Identification was accomplished by means of her driver's license found near this automobile.

When found the body had four rather severe wounds in the head made, according to the medical testimony, by some rugged object. A number of rocks were at the place where the body was found and undoubtedly rocks of this nature were the objects used in inflicting the death wound. The body of deceased was fully clad. The deceased's dress was

buttoned up to the top and, in addition, a gold breast pin at the top of her dress was still intact and pinned. Although the medical testimony is to the effect that these wounds were of a nature that would not only bleed frequently but would spurt, no blood was found on the dress. The medical testimony as to the nature of these wounds bleeding frequently is further confirmed by the fact that after the body was removed to an undertaking establishment and there placed upon the table, they began to bleed.

In the car there was found the pocketbook of the deceased, the contents having been scattered over the front seat and on the ground near the car so as to give the appearance of robbery. In the car was found a box of 12 amytal tablets, the same number purchased by the deceased on the previous night. Some other medicine was likewise found and there was found an empty crushed amytal box, the significance of which appears in connection with the chemical examination of a part of the tissues of deceased disclosing a large amount of amytal present in these tissues. On the next day, the bank books carried by deceased and a rosary of beads were found in the vicinity of this car. Despite, however, the fact that an attempt had been made to give the homicide the appearance of robbery, the suitcase of deceased which was in the back seat of the car apparently had not been opened because when investigated by the officers, its packing had not been disturbed.

A complete examination was made of the car, no trace of blood could be found in it, and a complete examination was made of the terrain surrounding this slough. No trace of blood or sign of a struggle of any kind could be found at this point. Later one of the investigating officers walked from the home of deceased over the route she would naturally take to the scene of the crime and no trace of blood or sign of struggle could be found along such route. However, one significant clue was revealed at the scene of

the robbery. Upon the left side of the front cushion of this automobile there appeared a muddy footprint. A preservative was sprayed over it and its shape thereby secured. The materiality of this becomes evident when we remember that later a pair of shoes, the property of Ware, was secured and later one of these shoes was found to fit completely in this track. Fingerprints from the car could not be obtained because the road where it was sitting was composed of gravel and the dust from this gravel had completely absorbed the moisture of such fingerprints and rendered impossible any definite procurement thereof.

After an investigation had thus been made at the scene of the crime the body was turned over to an undertaking establishment and the investigating officers proceeded to the address contained on this driver's license for the purpose of further investigating. Shortly after they reached that spot, the petitioner Ashcraft appeared. The testimony of the officers is to the effect that they informed him of the murder of his wife and that his first response was that it could not have been his wife because she had left to go to Kentucky early that morning. However, the officers testify that when he was so informed of the tragedy, he manifested no emotion, made no inquiry as to how she had met her death, as to the locality, and in short, from their testimony, the inference is that he seemed rather indifferent to it. However, at once he did inquire of the officers as to whether or not the deceased had been robbed and made the statement that the deceased had $50.00 in her purse and that in a small chamois bag pinned to an inner garment she had $200.00. The petitioner Ashcraft was taken to the undertaking establishment for the purpose of identifying the body and, according to those who were present, displayed no emotion nor made any inquiry other than to pat the lifeless form of deceased and to make the statements that she had been a good girl to him. At

that time her clothing was removed and this undergarment, to which the petitioner stated that the pouch had been pinned, was examined and no sign could be found that any such receptacle had ever been pinned therein. The testimony is definitely to the effect that no pinholes could be found in this garment.

Shortly thereafter the petitioner Ashcraft was taken to the police station and there interviewed by the authorities for the purpose of assisting them in the discovery of the criminal. No complaint is made as to this interview and evidently he was under no duress whatsoever. In this interview in substance, he made the statement that they had arisen about 3:00 A. M. and that he backed the car out of the garage and that deceased got in. He made the further statement that due to a leak in the hose connection, the car was slow to warm up and that deceased sat in the car until the miss in the engine ceased and that she then drove off and that he went back to bed, arose at his accustomed time, fixed his breakfast and went to work. He likewise made the statement that deceased complained of a headache upon this morning and that she took an amytal tablet and made the statement that if this did not relieve her head, she would take another tablet and a coca-cola somewhere along the route.

Following this interview with Ashcraft, the investigating officers used the automobile in question quite frequently but could find no evidence of any engine trouble in their use of it, which naturally threw suspicion upon Ashcraft. The nature of the facts surrounding the homicide was such as to throw doubt upon his suggestion that robbery had been the motive for the homicide and so the officers decided to further interrogate Ashcraft about the matter and point out to him the discrepancies in the story that he had given them. Accordingly on Saturday, June 14, about 7:00 to 7:30 P. M., they got Ashcraft, took him to the fifth floor

of the Shelby County Jail, and Mr. Becker in charge of homicide investigation, and Mr. Battle, an Assistant Attorney General, began to question him about the situation. During all this investigation, Ashcraft made no incriminating statement other than it is testified that about 11:00 upon this same night, he made the statement that he realized that a good many circumsances pointed toward him but that he was not guilty. The investigation continued for the remainder of that night and the next day and next night until approximately 11:00 P. M., on Sunday night, when Ashcraft made the statement to the officers that a negro had killed his wife, a negro by the name of John or Tom Ware. It might be stated parenthetically that this is the first time that the name of Ware had been brought into the case and it seems definite that the officers had no idea that Ware had any connection with the case until this disclosure of the statement by Ashcraft. Upon being informed that Ashcraft could not inform them as to where this negro lived but could show them, the officers took him in the car and under his direction, went to the home of Ware. The testimony is to the effect that this party left the jail about midnight on Sunday night. The record upon this trial does not reveal just how long it took the officers to go to Ware's home and return, but suffice it to say that they did go to the place where Ashcraft told them Ware lived, and after going in the wrong house first, they arrested Ware, put him in the car and returned to the jail. It may be well assumed by the Court that this took approximately an hour although the distance from the jail to Ware's home is not disclosed in the record, but the normal occurrences as detailed by the witness would necessarily entail some time and the state thinks it not an unreasonable inference to conclude that they reached the jail approximately about 1:00 A. M.

According to the state's testimony, Ware and Asheraft were both carried to the fifth floor of the jail and there Asheraft was confronted with Ware, and Ware asked the question as to whether or not he knew Asheraft. Ware replied that he did and then he was asked as to the date of the last time he had ridden with Asheraft in his car. According to the testimony of those who were present, Asheraft undertook to suggest an answer to Ware and thereupon Ware turned to the investigating officers and asked them if they desired the truth. Upon receiving an affirmative answer, their testimony is that he turned to Asheraft and said in substance that he had told him when this matter came up if they got into any trouble, he was not going to take all the blame. According to the State's officers who were present, this disclosure or admission on the part of Ware occurred within five minutes after he was carried to the fifth floor of the Shelby County Jail. Thereupon Ware made a complete confession of his participation in the crime, stating in substance that Asheraft had hired him to kill the deceased, that Asheraft had gone to his home and gotten him and carried him to the place of departure and that he waited a considerable time, and that finally Asheraft and the deceased came up and he told them it was a hold-up and that under his direction, the deceased drove the car to this spot where it was later found parked and that there he caused the deceased to get out of the car, that he took from her wrist, under Asheraft's direction, her wrist watch and that he gave it to Asheraft and shoved her in this slough. He testifies that the deceased began to scream and thereupon under Asheraft's direction, he struck her in the head with rocks.

At this point it should be noted that when the officers went to Asheraft's home on the day of the discovery of the body, they found this wrist watch in a chest of drawers. The testimony developed that the maid who had come to

clean the house on the day following the departure of the deceased, found this wrist watch lying upon a box and had placed it in this chest of drawers obviously for better protection and safekeeping. It should be stated here that a lady in the neighborhood who was awake about 3:00 A. M. on the morning of the homicide, heard two screams which she describes as being muffled and coming from the direction in which the body was found. The time of the advent of this car is fixed as between 2:30 P. M. upon this morning when one witness passed the scene and no car was parked there and 3:25 A. M. when a milkman passing saw this car parked at this spot. Another witness going to his home from his duties on one of the daily papers in Memphis also saw a man standing at the left side of this car and moving toward the rear as his car approached. This witness was unable to distinguish the color of the person in question.

After Ware had thus made this confession to the investigating officers, Mr. Waldauer, an experienced Court Reporter of complete integrity of the City of Memphis, was called to the jail. His notation showed that he was called at 1:40, arrived at the jail at 2:10 and at 2:15 began to take the confession of Ware. This time element is important in view of the contention on behalf of Ware that his confession was coerced. Mr. Waldauer testifies that he took every word that was uttered by any person present and that the notes on the confession were completed in 15 to 20 minutes and so, therefore, from Mr. Waldauer's testimony it is obvious that Ware's confession so far as the stenographic report thereof be concerned, was taken in not exceeding an hour and a half after he reached the jail. The transcription of the confession was completed at 5:40 A. M. upon this same morning and read to Ware in the presence of a number of persons. They all testify that Ware signed the confession freely, that no force of compulsion was used

upon him and, incidentally, Mr. Waldauer testifies that he inquired of Ware as to how he had been treated and was informed by the latter that he had been treated all right.

As bearing upon the guilt of Ware, the testimony shows that although Ware had been accustomed to working at his place of employment for from 7½ to 9 hours each day prior to the homicide, while he reported for work on the morning following the homicide he worked only two hours, saying that he was sick and then appeared for work no more for the following four days.

According to the officers, on Tuesday following Ware's confession early Monday morning, he was placed in a car by them and taken to his home. From that point the officers testify that Ware directed them to the home of Asheraft, and from that point carried them over the route traveled by him and pointed out to them the scene of the homicide and, with their assistance, to a large degree reenacted it.

Asheraft did not take the stand upon this trial. However, Ware testified and repudiated his confession, insisting that he had no part in the homicide of deceased, that he did not know where Asheraft lived and that he was compelled to go to the home of Asheraft by the officers, that he had no knowledge as to where it was but the officers took him there, and that he was coerced into such reenaction of the crime as was done by him. His testimony with reference to the making of the confession was that when he was arrested, the officers refused to inform him why he was being arrested and that he was handcuffed at his home and as he was going down the steps of his house he was struck a hard blow that almost knocked him down and that he had to be finally carried and placed in the car. His testimony is that when he was carried to the jail and confronted with Asheraft he only knew the latter was "Mr. Johnny" and that he had to be informed by the officers as to Asheraft's last name. He denies making the statement testi-

fied to by the officers with reference to his refusal to take the entire blame. He testifies that then after this he was taken to the second floor of the jail and placed in a padded cell which the record shows is located on that floor, and after remaining in that receptacle for some time he was taken out by two officers, both of whom testify and who told him that a mob was forming and that unless he confessed to the murder of deceased he would be turned over to that mob. He testifies that under this type of pressure he agreed to confess to anything rather than to permit a mob to get him.

In rebuttal, Becker, Ezell, General Battle and Jayroe, all of whom were present, testify definitely that the ptitioner, Ware, was not struck on leaving his home; that he was not taken off the fifth floor of the jail after he was brought there with Ashcraft until the next morning and following his arraignment before a magistrate, and that no one put him in the padded cell nor threatened him with mob violence. Incidentally, it might be mentioned in passing that an examination of the body of deceased disclosed that she had not been criminally assaulted.

BRIEF

I

The Fourteenth Amendment does not bring to the test of decision of the Supreme Court every ruling made by a state court in the course of a criminal trial therein.

Avery v. *Alabama*, 308 U. S. 444;
Buchalter v. *New York*, 319 U. S. 427.

II

The construction by the court of last resort of any state of its own mandate presents no question properly reviewable by this Court.

III

The former opinion of this Court in this case contained no direction to dismiss further prosecution but merely held inadmissible the confession of Asheraft, reversed the case as to him for this reason, and vacated the judgment of the Supreme Court of Tennessee as to Ware for further consideration in the light of the holding of this Court with reference to the conviction of Asheraft.

IV

Separate trials are allowable under Tennessee procedure only where prejudice will result from a denial thereof.

Woodruff v. *State*, 164 Tenn. 530;
Kennon v. *State*, 181 Tenn. 415.

The sole ground alleged as prejudicial is that upon a joint trial the confession of Ware could be introduced. Since Asheraft stands convicted of being an accessory before the fact to the crime of murder, the confession of the principal

is admissible upon a separate trial as showing the guilt of such principal.

Givens v. *State*, 103 Tenn. 648;
Hale v. *U. S.* (C. C. A. 8th Cir.), 25 Fed. (2) 430;
Wigmore on Evidence, Third Ed., Sec. 1079.

V

The confession of Ware was not procured by unlawful means.

Lyons v. *Oklahoma*, 322 U. S. 596;
Woods v. *U. S.* (Court of Appeals, D. C.), 128 Fed. 265.

VI

No violation of Ashcraft's constitutional rights was committed by the introduction of the statements made by him during his examination.

(a) He made no statement therein admitting his guilt or properly constituting a link in the chain of circumstances against him.

(b) The weight of authority is to the effect that exculpatory statements need not be shown to be voluntary.

(c) His counsel conceded that the statements in question did not prejudice Ashcraft (Tr. pp. 158-9).

(d) No circumstance evolved by such questioning was relied on in the Supreme Court of Tennessee nor in this Court in aid of conviction.

(e) Since Ware was insisting that he was forced into a confession by his arrest about midnight, it was permissible to show that Ashcraft had accused him of the homicide, thus justifying his arrest.

VII

A claim of fundamental unfairness in the trial in a state court must be sustained, not as a matter of speculation but as a demonstrable reality.

Adams v. *U. S.*, 317 U. S. 269;
Buchalter v. *N. Y., supra.*

VIII

An immediate arraignment under the circumstances was not required of the arresting officers.

Wynn v. *State*, 181 Tenn. 325;
State v. *Nat. Surety Co.*, 162 Tenn. 547.

IX

Reading of reported cases to a jury in argument generally lies within the discretion of the trial court.

Note to 77 A. L. R. 656.

The rule in Tennessee is the same.

Swithson v. *State*, 127 Tenn. 357;
Davis v. *State*, 161 Tenn. 23.

As directly in point see *People* v. *Paisley*, 299 Ill., 576, 132 N. E. 822. Besides, the court merely declined to allow counsel to read the facts contained in the opinion of this Court upon the former appeal and did not restrict them in the presentation of the law contained therein (Tr. pp. 369, 370, 372).

Argument

The respondent regrets that counsel for petitioners saw fit to ignore the admonition of this Court in *Avery* v. *Alabama, supra,* and in *Buchalter* v. *N. Y., supra,* to the effect that not evey alleged error committed in the trial of a case in the Supreme Court is reviewable here by virtue of the

Fourteenth Amendment. Upon the contrary, they have sought to proceed in this Court as though a review by it is a matter of right and comprehends every alleged erroneous ruling made in the state courts. The respondent respectfully insists that such is not the case and that this Court examines proceedings in the state courts only with the view to determining whether or not therein there existed that essential unfairness repugnant to the accepted concepts of justice prevalent in the English speaking world.

Betts v. *Brady*, 316 U. S. 455;

See also Opinion Frankfurter, J. in *Malinski* v. *People of N. Y.*, 325 U. S. —, 89 L. ed. 738.

However, as above noted, since counsel reiterate the contention that the petitioners were convicted solely and alone upon testimony extorted from them by methods foreign to such concepts of justice, the respondent has no alternative other than to discuss in detail circumstances relied upon by the prosecution and to show that they justified the verdict of the jury in the lower court and its subsequent affirmance by the Supreme Court of the State, and in addition, that none of these circumstances stem from any alleged unlawful pressure upon either of the petitioners with the exception of the confession of Ware.

When we come to a discussion of the facts, the respondent thinks that following the usual order of matters, the guilt of Ware should be first discussed and later the guilt of Ashcraft as accessory. When we come to the question of the guilt of Ware, it seems to the respondent that the trial jury were well warranted in concluding that he was guilty because his confession is bolstered up by so many circumstances that the jury were almost required to accredit it from such corroboration by additional facts. Of course, the confession if taken as true makes a case of guilt against

Ware beyond peradventure and no further comment need be made upon this.

When we come to the circumstances corroborating the confession, it seems to the writer that they are numerous. In the first place, we have the muddy footprints upon the cushion of this car and the subsequent procurement of the shoes of Ware and a demonstration before a jury as to how accurately the left foot of Ware fitted this footprint. Apparently this demonstration must have been conclusive because the record discloses that counsel representing Ware failed to cross-examine this witness about any discrepancy between the footprints and this shoe, and this fact in itself would seem to indicate that the fit was perfect. This muddy footprint beyond question was made by one of the perpetrators of this murder and Ware, while upon the stand, does not deny the shoes used were his property nor does he make any reference to such. Obviously from this circumstance, the jury were completely warranted by their action in concluding that Ware was at the scene of the crime, and he could not have been at the scene of the crime and have made a muddy footprint upon this cushion without being one of the perpetrators of the crime.

Next, we have the circumstances testified by the officers and evidently accredited by the jury that on the morning following his confession Ware was able to take them from his home to Asheraft's home and thence to the scene of the homicide. Now then, so far as the record be concerned Ware had never been to Asheraft's home prior to the day of the homicide and his ability to take them from his home to that of Asheraft with a mile intervening, with no previous knowledge of the location of Asheraft's home and his further ability to carry them over the route taken by deceased and to the scene of the crime, indicates most definitely his connection therewith. Otherwise there would have been no possible way in which he could have been so accurate.

The third circumstance connecting Ware with the homicide and showing the guilt of Ware and the truthfulness of his confession consists in the fact that no blood was found upon the dress of deceased. It must be remembered that the medical testimony is to the effect that the wounds on the head of deceased were of such a nature as to bleed most freely. In fact, one of them severed an artery and would cause spurting and yet no blood could be found upon this dress when the body of deceased was taken from the water. It seems obvious to the writer that the deceased was struck upon the head with these rocks after she had been placed in the water or while she was standing in the water. Had she been struck at any other point, the flow of blood naturally would have gotten on the dress, but if she was struck while in the water, either the water itself might have lessened the flow of blood or the water would have diffused the blood from the head of the deceased in the water to the point where no blood would have reached the dress.

Another circumstance that tends to show Ware's guilt consists in his absence from work substantially all day following the killing and for four days thereafter. Ware in his confession makes the statement that Ashcraft allowed him to keep $50.00 that had been given him by deceased as a part of the pretended robbery, and since the record shows Ware to be more or less illiterate, ordinary run-of-the-mine negro, what would have been more natural for him with this newly obtained wealth than to conceive an excuse to leave his job upon that morning and have a glorious time so long as this money remained in his hands. This inference is further borne out by the fact that five days later Ware returned to work and this would be about the normal period of time that it would take a person of Ware's mentality to exhaust this amount of money.

Then, we come to the wrist-watch angle. It must be remembered that Ware in his confession testifies that he

took the wrist watch from the deceased and gave it to Ashcraft at the latter's request. Up to that time, the finding of this wrist watch had not figured in the slightest degree in the investigation and its significance was not realized until Ware made this statement. That the statement must be true is undoubtedly correct because not having realized the significance of it prior to Ware's mention of that fact, it could not have been suggested to him by any degree of comparison.

It is perfectly true that no witness testifies whether or not Mrs. Ashcraft was wearing this watch when she left upon this morning. It would seem most natural that a lady going on a trip of this duration would wear a wrist watch for her own convenience, but the respondent thinks there is another circumstance in the record that definitely leads to the conclusion that she did wear this watch upon this occasion. Cora Taylor, the maid of the deceased who came to clean her house on the day of the homicide, testifies that she found this wrist watch lying upon a box and that she put it in the chest of drawers obviously for better protection. Now then, the respondent thinks this involuntary gesture on the part of this negro woman indicates that the deceased had this watch when she was murdered. Mrs. Ashcraft intended to be absent from her home for sometime upon this visit and her normal instinct had she not intended to wear this wrist watch would have been to do the same thing as was done by this negro woman, and had she not worn it, she certainly would have put it in a more secluded place and would not have left a jewel of this value lying out in the open where it would be exposed to any person who might break into her house or otherwise obtain admission. Its presence at the point where it was found is consistent only with one theory and that is that Ware gave this watch to Ashcraft as stated by Ware in his confession and that Ashcraft, in the hurry and excitement, placed it on

this box where it was found and so this fact points to the truthfulness of Ware's confession in this respect.

Then finally, the nature of the homicide is completely consistent with Ware's confession. Obviously, the deceased was not criminally assaulted. Likewise, the definite showing is that this was not a homicide committed for the purpose of robbery. The normal robber would have been attracted by the gold pin at Mrs. Ashcraft's throat. He certainly would have gone through her suitcase to see if there were any valuables contained therein, and finally, it is certain that Mrs. Ashcraft would not have resisted a robbery to the point where the bandit would have been compelled to take her life to accomplish his purpose. Now under these circumstances, with it definitely being shown that the homicide was not committed for either of these two purposes and with the record failing to disclose a single enemy on the part of deceased, it obviously seems that she must have been murdered at the direction of or by someone who desired to get rid of her. Under this record, no one appears other than Ashcraft who possessed any such desire, and with his acquaintance of Ware, it would seem most natural that he would turn to Ware as the object to accomplish this purpose.

For the reasons above stated, the respondent respectfully insists that it can not be said that there is not substantial evidence to support the verdict so far as the guilt of Ware be concerned.

The respondent thinks that when the guilt of Ware of this crime shall have been established, the circumstances unerringly point to Ashcraft as an accomplice or accessory before the fact therein. First of all, Ware under this record, does not appear to be the type of negro who would commit a crime of this type of his own volition. As stated above, he seems to be the ordinary type of negro, happy-go-lucky, and certainly there is nothing in his antecedents or his

previous record to justify even a surmise that he would have been guilty of a crime of this sort solely and alone. Asheraft was acquainted with Ware and had worked upon the same job with him and if Asheraft had planned the crime as the respondent insists, Ware would have been his natural choice as the instrument through which it should be perpetrated. He had carried Ware to work in his automobile several times, and although he may have known many other negroes upon this job at which he was working, his contacts with Ware seemed to have been more intimate and he would feel more justified in selecting Ware as the pliant tool to accomplish his purpose.

The absence of criminal assault, the absence of a bona fide robbery and the failure of the record to disclose any enemies that Mrs. Asheraft had, definitely point to but one conclusion in connection with this homicide and definitely point to a planned crime. The abortive effort to make it appear as though she had been robbed, of course, indicates an attempt to divert suspicion from the real motive for the crime and set the officers upon a wild-goose chase. In this connection, it must be remembered that Asheraft upon first being contacted by the officers and informed of the death of the deceased advanced the robbery theory. This is completely consistent with his guilt in this case. Likewise, his false statement about the deceased having $200.00 in this pouch at her throat also is harmonious with the intent and effort upon his part to advance the theory of robbery as the motive for the homicide. Now then, the normal instinct of one whose wife had been murdered without his connivance certainly would have been to first of all inquire about the details of the crime, the locus in quo and other first-thought matters. Obviously, the thought of the motive behind it, to the normal person, would have been completely secondary, and yet Asheraft's primary inquiry as to whether or not deceased had been robbed is directly in line with the

effort to have it appear that she had been robbed. In short, from this the jury might infer that Ashcraft sought to advance the theory of robbery as the motive for the homicide and thus divert suspicion from the real cause thereof.

The next circumstance which the respondent thinks makes Ashcraft out to be connected with the crime lies in the fact that Ware, the actual perpetrator, was able to commit this homicide; so far as the record goes, Ware himself testifies that he did not know that Ashcraft had a wife. He certainly did not know that Mrs. Ashcraft was going to Kentucky or was going to leave home the next day unless he obtained that information from the petitioner Ashcraft himself. So far as this record goes, only seven persons knew that Mrs. Ashcraft intended to make this trip and to leave at this early hour upon this morning. Of these seven, Ashcraft is the only one who was acquainted with Ware. Five of the other appear above suspicion. Cora Taylor, the negro maid, by both examination and investigation was absolved of any connection with the death of the deceased. The question naturally recurs as to how then was Ware able to place himself at a point where this homicide could be committed unless by the connivance of Ashcraft. Ashcraft is the only contact through which he might perpetrate this homicide, and that fact alone seems to the writer to necessarily indicate Ashcraft's complicity in the crime if, as we must assume, Ware committed it. Stated otherwise, Ware would never have known any of the movements of the deceased and would not have been able to place himself in position to commit the crime unless it was clearly by Ashcraft's connivance.

Then, we have the wrist-watch angle. We have discussed that in connection with the guilt of Ware and will not reiterate what has there been stated. The presence of this wrist watch at the place it was found clearly indicates that it was taken from the wrist of deceased at the time of the

homicide. Its presence in the home afterward is absolutely inconsistent with the innocence of Ashcraft and affords a strong circumstance of guilt.

Then another factor that the jury might well consider in connection with the question as to whether or not Ashcraft was an accessory before the fact consists in the ability, as testified to by the officers, of Ware to take them from his home to the home of Ashcraft. Under this record, Ware, who lived a mile away, had no previous knowledge of the location of Ashcraft's home and he could have acquired this knowledge only by having been at Ashcraft's home for the purpose of committing this homicide as testified in his confession. His ability to take the officers to this home indicates definitely a knowledge of its location. He could have acquired such knowledge only by a previous trip and under the sponsorship of Ashcraft and this previous trip could have occurred only for the purpose of committing the homicide.

Ashcraft's statements about the condition of this automobile are definitely shown to have been false. Those same statements indicating engine trouble, if taken as true, would have a tendency to lead one to conclude that perhaps engine trouble overtook this car at this lonely spot and caused its stoppage and thereby afforded an opportunity for some marauder to have committed the crime. Again, the normal effect of this statement, if believed, would have been to divert suspicion from Ashcraft and to cast it upon someone unknown. As above stated in connection with the discussion of the effort to make this appear as robbery, these statements of Ashcraft all point toward a common end and that of an effort to divert suspicion from him. Obviously, whenever a spouse be slain, an investigation thereof begins normally and naturally with the other spouse. As stated in the minority opinion upon the former appeal of this case to the Supreme Court of the United States, no inves-

tigation worthy of the name would not include Ashcraft. Were he astute enough to conceive the plan which apparently he did for the taking of the life of deceased, he was certainly astute enough to realize this factor and the jury might well have concluded that his efforts to establish a robbery and to establish the possibility of a mechanical breakdown of this car at this point were efforts upon his part to divert suspicion from him at a time when it had not been directed toward him. The trial jury might well have concluded that this was an instance of the exemplification of the truth of the adage that the guilty fleeth when no man pursueth, and were completely justified in taking it as a circumstance of guilt in the case.

Then too, the complete indifference of Ashcraft to the nature of the crime stands as a circumstance that the jury might properly consider as indicating guilt. His attitude as testified by various witness was so abnormal as to require more than passing notice. There was no inquiry as to how the deceased met her death, as to where she met her death or anything of the kind, but on the contrary, there was the immediate inquiry as to whether or not she had been robbed. Again, the desire to divert suspicion seemed to be paramount and the failure of Ashcraft to make any inquiry as to the details of the crime is completely consistent with the previous knowledge on his part as to how it occurred. This previous knowledge could have been obtained only by a participation therein.

Finally, Ashcraft certainly seems to have been supplied with a motive for so doing. The record discloses that the deceased was extremely nervous, that there were times when she would scream and carry on to the point that life with her must have been unbearable. The record discloses more than a suspicion that she was not able to consummate the marital relation due to this operation and with Ashcraft standing to come the sole owner of almost $7500.00

of their accumulations as a result of her accidental death, it can be seen that a substantial motive appears that might impel him to try to make away with her.

After all, this chain of circumstances certainly would warrant the jury in concluding that Asheraft counseled and advised and procured Ware to commit this crime. This Court could hardly say that Ware would have committed it of his own volition. He does not appear that type negro. If he committed it, and it seems obvious from the record that he did, he was employed to do it by someone else. That someone could be Asheraft only under this record.

For these reasons, it is insisted that the verdict as to Asheraft is supported by substantial evidence.

The method by which the Supreme Court of Tennessee reviews the facts in criminal cases is well settled by numerous of its decisions. The prevailing rule is that the verdict of guilty at the hands of a jury and the subsequent approval of such verdict by the trial judge removes the presumption of innocence theretofore prevailing upon the trial and converts it into one of guilt and that before a reversal will be had upon the facts in a criminal case, the evidence in the case must preponderate against such verdict.

Cooper v. *State*, 123 Tenn., 37, 60-61;
Mahon v. *State*, 127 Tenn., 535, 549.

The same rule applies where the evidence relied upon consists of circumstantial evidence alone.

Foster v. *State*, 180 Tenn., 164, 172.

From the discussion of the foregoing circumstances relied upon by the respondent as constituting substantial evidence to support the verdict of the jury and its subsequent affirmance by the Supreme Court of Tennessee, it will be seen that none of them with the exception of the confession of Ware can be claimed to have been extorted from either of the peti-

tioners by unlawful means. On the contrary, they were matters developed by investigation and with clues to some of them being revealed by Ware's confession.

The respondent insists that the rule which should prevail in this Court is that where the evidence be of such nature that the minds of reasonable men may arrive at different conclusions as to the inferences to be drawn therefrom, this Court should not constitute itself a superjury, but upon the contrary should accord to the findings of the state courts that degree of respect which our coordinate system of government implies as belonging to the several states. In the present case, the fact that the minds of reasonable men might differ as to the conclusions to be drawn from the circumstances is evidenced by the fact that a trial jury reached the conclusion therefrom that the petitioners were guilty, their verdict was approved by the trial judge sitting as a thirteenth juror under the rule prevailing in Tennessee (See *Curran* v. *State*, 157 Tenn., 7), and a subsequent affirmance of the verdict by the Supreme Court of the state after an investigation to determine whether or not it preponderated against the evidence.

The next insistence on behalf of petitioners, in the opinion of the respondent, presents no appropriate question for review at the hands of this Court. It is the insistence that the mandate of the Supreme Court of Tennessee required the trial judge to hold inadmissible in evidence the confession of Ware. This question was strenuously urged upon the Supreme Court of Tennessee upon the appeal, to review which this petition is filed, and was denied and overruled by that Court. The respondent insists that the proper construction of its own mandate or procedendo, as such is termed in Tennessee, presents purely a question of state law upon which the decision of the state courts must be final. Of course, if the mandate of the Supreme Court of Tennessee did not conform to that of this Court in revers-

ing the case, then such would be reviewable by this Court; but when the opinion of this Court on the former appeal be examined, it may be seen that it merely held that the confession of Ashcraft was procured by illegal and unlawful methods and that its introduction in evidence against him constituted a violation of his constitutional rights, and for its error in holding such confession admissible, the judgment of the Supreme Court of Tennessee was reversed and the cause remanded to that Court; and at the same time the conviction of Ware was vacated in order that the Supreme Court of Tennessee might reconsider his appeal in the light of the holding of this Court as to the admissibility of the confession of Ashcraft. There was no direction by this Court in either its opinion or its mandate that further prosecution of the petitioners be terminated. It would have been an undue intrusion on the part of this Court into the province of the state courts had such a direction been made, and the opinions of this Court disclose that it is most careful to undertake to assiduously observe the line of demarcation between its functions and those of the courts of the several states.

Much ado is made in the petition of a concession by counsel upon the argument of the former appeal in this case to the effect that in the absence of a confession, there was insufficient testimony upon which to sustain a conviction. This concession in reality became of no moment in the decision of this case because shortly thereafter this Court expressly held that where the constitutional rights of one charged with crime were violated by the admission of an extorted confession, such action required a reversal despite the fact that there might be sufficient evidence apart from such confession upon which the verdict might rest. See footnote 1 to *Lyons* v. *Oklahoma, supra.*

After all, the sufficiency of evidence to convict lies primarily within the province of the triers of fact, the trial

jury. The trial court and also the various appellate courts, of course, have functions in connection therewith upon appeal but the concession of counsel, following his recognition that the admissibility of the confession presented reversible error for which the judgment would have to be reversed irrespective of the other supporting evidence, does not constitute an adjudication that would prevent a re-examination of the evidence in the case and a different determination upon a more mature consideration of the various circumstances.

The fact that upon another trial, twelve triers of the fact, the trial judge who presided with impartiality and the court of last resort of Tennessee were all of a different opinion from counsel who made the concession, demonstrates concretely a sound reason why such concession should not have the binding effect of an adjudication. Facetiously speaking, it might be stated that this does not constitute the first occasion upon which the courts have differed with the writer of this brief who was counsel making the concession and he fears that it will not mean the end of such divergence of opinion.

The next insistence is made primarily on behalf of the petitioner Ashcraft and is to the effect that his constitutional rights under the Fourteenth Amendment were violated and due process denied him by the action of the trial court in declining to grant him a separate trial from his co-petitioner. No doubt this contention was suggested by the dissenting opinion of Mr. Justice Rutledge in *Malinski* v. *N. Y.*, *supra*, but the facts of the cases are so unlike that the dissent in that case is hardly applicable to the present case. In *Malinski* v. *N. Y.*, *supra*, the co-defendant Rudish was jointly indicted with Malinski for homicide. In the present case although it is true that petitioner Ashcraft was jointly indicted with Ware for the homicide of deceased, he was also indicted as an accessory before the fact which

charged him with having incited and procured Ware to slay the deceased. He was convicted upon the count of the indictment charging him with being an accessory before the fact to such homicide, which under Tennessee procedure operated as an acquittal of the charge of murder as to him.

Tennessee still preserves the common law distinction between principals and accessories before the fact. See *Pierce* v. *State*, 130 Tenn. 24. The common law rule, however, is subject to the statutory change that an accessory before the fact may be prosecuted and convicted prior to the conviction of the principal. See Code of Tennessee, Section 10761.

The rule in Tennessee with reference to separate trials is that the prosecution is entitled to have tried jointly all persons jointly indicted unless it shall appear either before or after such joint trial that prejudice will result or has resulted from such joint trial. See *Woodruff* v. *State*, *supra;* and *Kennon* v. *State, supra.* This rule can not be said to be so lacking in reason as to deny due process but, on the contrary, is a matter well within the realm which our joint system has confided to the various states.

Following the common law concept of an accessory before the fact, it is always necessary, before one may be convicted as an accessory, that the guilt of the principal offender be established and, to this end, any evidence which would be admissible against the principal is admissible against the accessory, not, of course, to establish the guilt of the latter but, on the contrary, to establish the guilt of the principal of the offense which it is claimed that the alleged accessory counseled and advised.

Under the rule prevailing in Tennessee as well as the overwhelming weight of authority, the confessions of a principal to the effect that he committed the principal crime are always admissible against the accessory not for the purpose of establishing the latter's connection but for the

purpose of showing the guilt of the principal. See *Givens* v. *State, supra; Hale* v. *U. S., supra.*

Mr. Wigmore in his work on Evidence lays down this rule. See Section 1079, Third Edition.

Now then, the only insistence made on behalf of Ashcraft under this assignment is that he was prejudiced by the admission of Ware's confession, and as we have said, this confession would have been admissible upon his separate trial. If this confession could not have been excluded upon such a separate trial and as above seen, it could not have been, it is difficult to conceive just how petitioner Ashcraft was prejudiced by this joint trial. The trial judge very definitely instructed the jury during the progress of the trial that the statements in such confession indicative of Ashcraft's guilt were not admissible against him and must not be considered by them (Tr. pp. 169-70, 208, 209, 227, 248). In addition thereto, the trial judge expressly instructed the jury in his general charge that they would not consider such statements against Ashcraft (Tr. pp. 381, 383). This was in keeping with the rule in Tennessee. See *Porter* v. *State*, 177 Tenn. 515, 521. We respectfully insist that this contention is without merit.

Although not specifically mentioned in specification of errors (and this demonstrates again the zeal on behalf of petitioner Ashcraft and apparent indifference as to Ware), the next question presented deals with the admissibility of the confession of Ware. After petitioner Ashcraft had informed the officers that a negro had killed his wife and that he could show them where the negro lived, giving Ware's name in this connection, the officers in charge of the investigation put Ashcraft in an automobile with them and he directed them to where Ware lived. Ware was arrested at approximately midnight and without dispute was immediately taken to the Shelby County Jail. There is a dispute as to what occurred at that point. The arresting

officers testify that when Ware was confronted with Ashcraft, in response to a question from the officers he admitted that he was acquainted with Ashcraft and within five minutes afer he reached the jail, he asked the officers if they wanted the truth about the transaction and made the statement to Ashcraft that he did not intend to take the entire blame. The persons in charge of the investigation, four in number, all testify that when Ware was brought to the jail he was immediately carried to the fifth floor thereof and remained on that floor until he was taken down for arraignment the next morning, and they all testify that no threats of any kind were made against him and that he was not mistreated. Mr. Waldauer, a Court Reporter of unquestioned integrity in Memphis, was called to the jail and began taking down Ware's confession at 2:15 according to his notes. Ware arrived at the jail at approximately 1:00 A. M. according to the testimony of Mr. Becker, who was in charge of the investigation. In addition, Mr. Waldauer testified that he inquired of Ware as to how he had been treated and that Ware informed him that he had not been harmed.

Against this testimony of four witnesses on the part of the prosecution who were present when Ware was arrested and brought to the jail, the petitioners rely upon the unsupported testimony of Ware to the effect that he was beaten, placed in a padded cell of uncomfortable nature and threatened with mob violence. As was recognized in the minority opinion in this case upon the former appeal, there is no testimony except that of Ware as to any mistreatment.

Now then, conformably to the practice in Tennessee, when the question of Ware's confession was first brought up, the trial judge excluded the jury from the courtroom and after hearing testimony upon this question, found that the confession was freely and voluntarily made (Tr. p. 206). In addition thereto, in his charge he instructed the jury that

before they could consider the alleged confessions of Ware, they must find beyond a reasonable doubt that such confessions were made freely and voluntarily, and if they had a reasonable doubt as to this fact, they would not be considered (Tr. pp. 282-283).

In addition to this fact, after a review of the evidence upon this point, the Supreme Court of Tennessee expressly found that the confession was not produced by duress or threats.

The respondent realizes that this Court will make an independent examination of the facts in each case where it is claimed that a confession was extorted, but in the present case it must be remembered by this Court that only the party who stands to gain by the exclusion of a confession testifies as to any relevant facts justifying the exclusion of such confession. Ware is contradicted by every other witness who testifies. His testimony to the effect that he was taken to the second floor of this jail and placed in the padded cell, which actually is upon that floor, is contradicted by the testimony of Becker, Battle, Ezell and Jaroe to the effect that he was not taken from the fifth floor of this jail until sometime the next morning long after the confession had been made and signed by him. There is a contention on behalf of Ware to the effect that his knowledge of this padded cell could not have been obtained in any other manner. But when it is remembered that Ware was confined in this jail from June 15, 1941, until his first trial sometime the following November and thereafter until other proceedings in the case, it would be strikingly strange if the so-called jail grapevine had not accorded him abundant opportunity to learn of the existence of this padded cell. It is much more reasonable to conclude that Ware, who, as stated by Mr. Justice Jackson, "is obviously a much weaker person than Ashcraft," was astounded by the sudden confrontation with Ashcraft, his alleged partner in

crime, and that this unexpected sight caused him to realize his only hope of safety lay in the direction of a full and complete disclosure of his part in the homicide.

When it be considered that Ware is the only person testifying to coercive methods on the part of the officers, when it be considered that four of them testify to the contrary, and in addition, Ware is contradicted by his statement to Mr. Waldauer and when it be further remembered that the trial judge who observed all of the witnesses and the trial jury who likewise saw and heard the witnesses in person have found that the confession was not obtained by duress and that their sanction was approved by the Supreme Court of Tennessee, it strikes the writer that this Court, even after an independent examination, should be most hesitant to overturn the findings of the lower court upon this question based, as such would necessarily be upon the unsupported testimony of the person who stands to gain most by such action on the part of this Court.

Apparently counsel for the petitioners must realize the effect of the evidence in the present case because he primarily relies upon the fact that Ware was under arrest, that he was questioned and that he was not represented by counsel at this time. So far as Ware's arrest be concerned, it was completely lawful. Section 11536, subsection (4) of the Code of Tennessee authorized Ware's arrest upon this charge after Asheraft had informed the officers that he had slain the deceased. The rights of officers under such circumstances have been set forth by the Supreme Court of Tennessee in the case of *Dittberner* v. *State*, 155 Tenn., 102, 105; and *Jones* v. *State*, 161 Tenn., 370. Summarizing these decisions, it will be seen that the duty of an officer is to act with such promptness as may seem appropriate to him, and there can be no suggestion that an immediate arrest of one charged with the homicide was not both desirable and required by the circumstances. So far as the contention

be made that the confession was elicited by questions, this Court recently held in *Lyons* v. *Oklahoma, supra*, that questioning of a suspect while in custody is not prohibited either as a matter of common law or due process. As to the contention that petitioners should have been arraigned prior to questioning, we merely wish to call to the attention of the Court the cases of *Wynn* v. *State, supra;* and *State* v. *National Surety Company, supra.* These cases construing state statutes as they do, are binding on this Court as to the effect and meaning of such statutes.

It is finally insisted that since the county in which this crime was committed has a statute creating the office of public defender, it was the duty of the officers to call such public defender. The statute in question is partially set out in the petition for certiorari and the contention in this respect constitutes but another instance of the reckless and extravagant statements contained in the petition. The statute in question is Ch. 69, Private Acts of 1917. Section 3(a) of it governing the duties of the public defender, reads as follows:

> "That upon *request by the defendant,* or upon order of the Court, it shall be the duty of the Public Defender to defend, without expense, *and to represent generally,* all persons who are without means to employ counsel, who have been indicted, by the grand jury or charged with the commission of any crime and *he shall, also, upon request, give counsel and advice to such persons* in and about any charge against them upon which he is conducting the defense, and he shall prosecute all appeals to a higher Court or Courts of any person who has been convicted upon such charge, where, in his opinion there is error in the conviction had, and such appeal will, or might reasonably be expected to result in the reversal or modification of the judgment of conviction." (Italics ours.)

In the excerpt from this same statute contained in the petition for certiorari, the first portion thereof providing for a request by the defendant is omitted and the words "also upon request" are omitted with reference to the duty of the public defender to give counsel and advice, merely another example of the inaccuracies with which the petition is replete.

Thus it can be seen from the very language of the statute itself and in direct contra-distinction to the extravagant claims of opposing counsel, a request for the services of the public defender is a condition precedent to his representation of any party charged with crime except where he be appointed by the court. The testimony in the case indicates definitely that no request was made by Ware for an attorney. Becker says he made no request for such and Ware himself makes no claim that he asked to see a lawyer and was denied this privilege. One thing appears rather definitely from the quoted statute and that is until a request for his services emanate from one charged with crime, this public defender is under no obligation to volunteer his services, and likewise in the absence of such request, the officers in charge of a suspect are under no obligation to enlist the aid of the public defender.

The respondent believes that the following language written by Mr. Justice Rutledge, while a member of the Court of Appeals of the District of Columbia, completely answers the contention of the petitioners in this respect:

> "Confessions, it is said, do not become involuntary because elicited by questions, or made while the confessor is under arrest, or in the absence of counsel, without warning or caution that the statement may be used against him, nor by the concurrence of all these conditions in a single case. *Admittedly these principles apply when the statement is not made in the course of judicial proceedings.*" (Italics ours.)
>
> *Wood* v. *U. S.*, 128 Fed. 2d 268.

For the reasons stated, the respondent insists that the confession of Ware was properly admitted and none of his constitutional rights were violated in this regard.

The next insistence is made upon behalf of Ashcraft alone, and is to the effect that the trial court erred in admitting any testimony whatsoever with reference to conversations of Ashcraft from 7:00 P. M. on Saturday night, June 14 until approximately 11:00 P. M. on June 15. By reference to the record it may be seen that there were only four statements made by him during this period that are of the slightest interest. They are (1) a statement that he realized that the circumstances pointed toward him but that he was not guilty; (2) the statement that a negro had killed his wife; (3) the statement that this negro's name was John or Tom Ware; and (4) a statement that he could show the officers where this negro lived.

Now we wish to call to the attention of the Court the fact that in none of these four statements is there anything akin to an admission of guilt upon the part of Ashcraft. Upon the contrary, the first statement contains an emphatic denial of his guilt and the latter three, which might properly be grouped as one, are to the effect that not he but John Ware had killed the deceased. There is no admission of guilt in this latter suggestion. Neither are any of these statements relied upon by the respondent as demonstrating the guilt of Ashcraft. In an earlier part of the brief we have referred to the circumstances relied upon to show Ashcraft's guilt. A reference to such will reveal that not one of these challenged statements is adverted to in our argument upon this proposition.

Counsel for petitioners have made as an exhibit to the petition for certiorari their reply brief in the Supreme Court of Tennessee. By reference to such reply brief, it will be seen that the prosecution in the Supreme Court of Tennessee expressly disclaimed any reliance upon these statements

or any part thereof as a circumstance tending to show guilt. The quoted portions of the brief for the prosecution in the Supreme Court of Tennessee will not be repeated here, but suffice it to say, they contain an emphatic declaration that none of these matters are relied upon as circumstances of guilt.

The respondent thinks it a logical inference from the record that the same was true of the trial court. Counsel for petitioners were not rationed when it came to making objections and neither were they niggardly or parsimonious in their use of objections. Had the prosecution in argument undertaken to refer to any of the facts revealed by this testimony, it is not an unreasonable inference to assume that opposing counsel, as diligent as they have been in the presentation of this case, would have interposed objections thereto, and since the record fails to reveal any objections on their part to argument to the jury relying upon these matters, it is a safe assumption that no such argument was made.

The respondent respectfully insists that prejudice forms the test of exclusion, and irrespective of the nature of the conduct of the investigating officers with reference to Ashcraft, yet no prejudice to him resulted therefrom, and he would not be entitled to a reversal of the judgment merely because he might have been mistreated by investigating officers. Had he been mistreated by them but without making any statements whatever or a confession, certainly it could not be said that his case should be reversed merely because of such mistreatment irrespective of whether or not he was prejudiced thereby. The situation is the same in the instant case, for where these statements were not utilized as a means of convicting him and certainly were not relied upon in the appellate court as evidencing his guilt, there appears that lack of demonstrable reality held necessary by this Court in *Adams* v. *U. S.*, *supra*, and in *Buchalter*

v. *N. Y., supra,* to a reversal of the judgment of the lower court upon the ground of unfairness.

The leading counsel for the petitioner Asheraft was evidently of the same opinion. When the testimony was offered, he made the following statement:

"Mr. Bickers: *I take it that they want to develop from this witness that the first information they had about a negro being involved came from this witness. I cannot complain of this* but, I can of this proposition that from the time of 7:30 that Saturday night until 8:30 Monday morning what he admitted to him to be a confession, is a part of the thing itself, and part of the entire confession, and *I don't think under the law that one line from the time he was brought into the jail at 7:30 Saturday night until Monday morning, under the rule of evidence, is competent. It don't hurt me for him to say during the investigation I believe about the negro killed his wife, I think that is what he wants to develop, but I take the position that this man was detained,* taken at 7:30 to the fifth floor of this jail, admittedly by every witness for the State, that he was placed behind the table with a light over him, and Mr. Becker on this side and Gen. Battle on this side, beginning at 7:30 Saturday night and ending at 8:30 Monday morning. I insist that every act of every witness in this case has been fully developed and scrutinized and passed on by the Supreme Court of the United States. I objected to that and stopped him right now, that he has no right to testify in the face of the record —four witnesses of the state admitted—that they brought him in at 7:30 Saturday night and described in detail how he was placed and what happened—he was examined by relays. That statement was corroborated by the other 4 witnesses in the case. From that testimony I insist the line of demarcation—I cannot distinguish between 7:30 and 8:30 Monday morning, in a case where Asheraft is being tried." (Italics ours.) (Record, pp. 158-9.)

The respondent feels that this attitude upon his part with reference to the prejudicial effect of the statements is the correct one. Having admitted at the time that the effect would not be prejudicial but that as a technical matter of law, the entire proceedings were inadmissible under the opinion of this Court on the former appeal, it would seem that the present contention savors somewhat of an afterthought.

As above mentioned, none of the declarations in question on the part of Asheraft during this period were of an incriminating nature. On the contrary, they were all exculpatory. The opinion of the Supreme Court of Tennessee has discussed most thoroughly the difference between the necessity for a showing of the voluntariness of confessions and exculpatory statements. The writer can add nothing to the discussion of this question contained in the opinion of the Supreme Court of Tennessee and respectfully refers the Court to it for that purpose.

Finally, it would seem that the evidence in question was clearly relevant upon another phase of the case. Relevancy is always the pole star of admissibility. Petitioner Ashcraft's co-defendant Ware was insisting strenuously in the trial court as in this Court that Ware's confession was coerced and brought about by an illegal arrest. Under the Tennessee statute cited above, an officer may without a warrant, arrest upon the charge made to him upon reasonable grounds of the commission of a felony. Since Ware was making this contention it was entirely proper for the prosecution to show that Asheraft had made a statement accusing Ware of this homicide and it was likewise permissible for this statement to be given in evidence before the jury, for in determining whether or not they would accredit Ware's confession, that body was entitled to take into consideration all of the circumstances surrounding the making of the confession, including the question as to

whether or not the arrest was authorized or illegal. For the reasons stated, the respondent respectfully insists that no error was committed in permitting the admission in evidence of Ashcraft's statements during this period.

The final contention is that the trial court denied to both petitioners the right to read to the jury the opinion of this Court upon the former appeal of this case. By reference to the record, it will be seen that the trial court did not deny counsel for the petitioners the right to read the law contained therein to the jury but forbade a reading of the facts stated in the opinion of this Court.

As noted in the brief proper, the general rule is that such matters lie within the discretion of the trial court. The note to 77 A. L. R., 656, makes this perfectly clear. Even in those jurisdictions which do permit as a matter of right the reading of opinions to the jury, it has been held improper to permit a reading of the facts as detailed by the appellate court upon a former trial of such case. See *People* v. *Paisley, supra.*

The rule in Tennessee is to the same effect. See *Smithson* v. *State, supra;* and generally upon the right to compare the facts of the instant case with those of reported cases, see *Davis* v. *State, supra.* At least the exercise of discretion on the part of the trial judge, a practice sanctioned by the overwhelming weight of authority in this country and in direct keeping with the rule in Tennessee, should not be held to be so unfair as to offend against the Fourteenth Amendment.

Again, the respondent wishes to call to the attention of the Court the numerous extravagant statements and claims made on behalf of the petitioners. Space would not permit a detailed answer and expose of each of them but the careful reader of the transcript will, in the opinion of the writer, find that the horrendous import of the petition for certiorari is by no means sustained by the transcript but the

transcript fails to bear out and support the extravagant claims of the petition.

Before closing, the respondent wishes to emphasize and reiterate a statement made to this Court upon the former appeal. It feels that from a careful investigation of the record the petitioner Ashcraft was the moving spirit in the death of the deceased and that without his instigation, petitioner Ware would never have dreamed of committing this crime. Ware occupied almost the same inanimate position in the hands of his co-petitioner as would any other type of weapon. The writer of this brief in his official position representing the State of Tennessee in criminal prosecutions, has never felt that where there be two criminals involved, one of greater and one of lesser degree, that the greater should escape while punishment was meted out to the lesser. Such does not comport with the writer's sense of justice and so as was the case upon the previous appeal, the respondent respectfully suggests to the Court that in case Ashcraft's appeal be sustained and the judgment reversed again as to him, the same procedure be followed as formerly and that the judgment of the Supreme Court of Tennessee as to Ware be again vacated and the cause remanded to that court.

For the reasons above stated, the respondent respectfully insists that the petition for certiorari is without merit and should be denied.

Respectfully submitted,

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Attorney General,
Of Counsel.